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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Petitioner,

v.

TRACY TEMPLETON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Perhaps the most important issue raised by North Western's petition is whether settled federal regulatory law may be retroactively "interpreted," and the revised law enforced without regard for constitutional and statutory mandates or the plain language of the regulation itself. Ironically, plaintiff's brief attempts to avoid the issue by transparently rewriting federal precedent and the history of this very litigation.

Plaintiff's inability to candidly face the issues raised by North Western's petition underscores the need for plenary review of the action below. Indeed, an analysis of plaintiff's brief suggests that summary reversal may be appropriate.

ARGUMENT

I.
THE FRA'S 1978 POLICY STATEMENT DID NOT PROVIDE REASONABLY CLEAR NOTICE OF A NEED FOR COMPLIANCE WITH THE OSHA REGULATIONS AT THE TIME OF PLAINTIFF'S ACCIDENT

The majority of the divided Supreme Court of Illinois was persuaded by plaintiff to find that the 1978 FRA Policy Statement's declarations of regulatory jurisdiction over railroad bridges was subject to two competing interpretations "which are equally reasonable." (p. A9).[1/] The court was also persuaded by plaintiff to resolve the perceived ambiguity against North Western, because the FRA's 1991 interpretation of the 1978 Policy Statement was not "plainly erroneous." (p. A7-9).

The lower court could not be persuaded by North Western to even consider the constitutional issues raised by its retroactive ruling. (Pet. at 13).[2/] Yet, this Court has emphasized that a regulation which is so vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 665 (1985).

The state high court's refusal to address the fundamental issues of due process raised by its retroactive ruling presents

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[1/] Page numbers in parenthesis preceded by "A" refer to the Appendix to the Petition; those preceded by "RA" refer to Respondent's Appendix.

[2/] References to the Petition for Certiorari are noted as "(Pet. at ___);" references to Respondent's Brief In Opposition are noted as "(Br. at ___)."

plaintiff with a substantial dilemma. The state high court, itself, found that one *could reasonably understand* the 1978 Policy Statement to vest exclusive jurisdiction over railroad bridges in the FRA. (p. A9). Indeed, the court's dissenting justices believed that such was the *only* rational interpretation which the Policy Statement permitted (pp. A13-17), as did the Appellate Court of Illinois (pp. A28-29), and the federal courts which had previously interpreted the Policy Statement.[3/]

The only solution plaintiff can devise to defend the lower court's arbitrary action is to radically revise the parties' roles below. Plaintiff deliberately mischaracterizes North Western as the *proponent* of ambiguity in the Policy Statement. The role reveral not only permits plaintiff to argue that the retroactive "interpretation" of the Policy Statement could not have intruded upon North Western's reasonable reliance interests; but, it even permits plaintiff to condemn North Western for "doing nothing to get a clarification from the FRA" between 1978 and 1991. (Br. at 24-25, 28).

However, plaintiff's revision of the record will not stand the slightest scrutiny. North Western never understood the Policy Statement to be a declaration of dual FRA/OSHA jurisdiction over railroad bridge safety. Plaintiff's own appendix attaches an internal North Western memo, dated February 12, 1981, which confirms that fact. Therein, North Western's General Attorney urges a company study of bridge safety improvements, while

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[3/] *Velasquez v. Southern Pacific Co.* , 734 F.2d 216 (5th Cir. 1984); *Norfolk & W. Ry. v. Public Utilities Comm'n of Ohio*, 727 F.Supp. 367, *aff'd*, 926 F.2d 567 (6th Cir. 1991). *See also, Norfolk & W. Ry. v. Burns*, 587 F.Supp. 161 (S.D. Mich. 1984); *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982); 45 U.S.C. §431(n) (1988).

nonetheless affirming that the company will resist OSHA citations regarding bridge safety equipment and railings because "*it is our position that OSHA does not have jurisdiction over track structures or bridges...*" (p. RA18).

Plaintiff's appendix contains an equally telling omission. Plaintiff asserts that North Western "asked the FRA for *clarification*" of its 1978 Policy Statement by letter dated July 18, 1990. (Br. at 26). Furthermore, according to plaintiff, the letter "provided the FRA with portions of the brief it filed with the Illinois Appellate Court in this case." (Br. at 26). Curiously, plaintiff fails to include the allegedly damning letter in his appendix. The omission was not an oversight.

The July 18, 1990 letter is here included as Petitioner's Supplemental Appendix. The letter does not petition for "clarification" of the FRA's 1978 Policy Statement; nor does it attach portions of North Western's appellate brief. Instead, the letter reiterates North Western's understanding that the FRA has exclusive jurisdiction over railroad bridge safety and it urges the FRA not to cede its existing jurisdiction to OSHA for sound reasons of public policy. (p. SA1).

Plaintiff's brief not only grossly misrepresents the letter's contents, but the occasion for its filing. The Rail Safety Improvement Act of 1988 directed that the FRA consider issuing such regulations "as may be necessary" for the safety of railroad bridge workers. 45 U.S.C. §431(n) (1988). In considering the issuance of such regulations, the FRA solicited public comment from the entire railroad industry concerning how the FRA might best proceed. 56 Fed.Reg. at 3435 (p. A70).

North Western responded based upon its understanding that the FRA had exclusive jurisdiction over railroad bridges.

(p. SA1). Indeed, as the FRA indicated in its 1991 Notice, "*all*" of the FRA's respondents filed submissions evidencing the same alleged "confusion." 56 Fed.Reg. at 3435 (p. A70). The dubious distinction between the regulation of bridge surfaces and the regulation of potential falls from those surfaces, which the FRA raised for the first time in 1991, had previously eluded *everyone*: the regulated community, railroad employees, the FRA's own safety inspectors and the federal courts. 56 Fed.Reg. at 3435 (p. A70).[4/]

II.
THE OPINION OF THE SUPREME COURT OF ILLINOIS IGNORES FEDERAL PRECEDENT AND FUNDAMENTAL CONSIDERATIONS OF DUE PROCESS

Previously, plaintiff successfully urged the state high court not to "slavishly follow" federal decisional law in this case and act independently. (Pet. at 10-11). Conversely, he now defends the court's opinion by contending that it is "entirely consistent with all federal precedent." (Br. at 1, 29). Plaintiff's brief, however, cannot cite any federal precedent which would lend credence to plaintiff's claim that such a remarkable metamorphosis was achieved.

For example, Plaintiff asserts that the lower court was correct in finding that the FRA's declaration of exclusive jurisdiction over "railroad operations" could reasonably be read to limit FRA jurisdiction to "the movement of equipment over rails." (Br. at 11, 14). In *Velasquez v. Southern Pacific Transp.*

[4/] As shown by North Western's petition, one could also expand the list of the "confused" to include the former FRA Administrator, John M. Sullivan, as well as the FRA's Office of Chief Counsel (Pet. at 19-20).

Co., 734 F.2d 216 (5th Cir. 1984), however, the Fifth Circuit flatly rejected such an assertion:

> Velasquez points to the FRA's definition of railroad operations as the 'movement of equipment over rails,' 43 Fed.Reg. at 10585, and argues that this language limits displacement of OSHA to activities actually involving such movement. We disagree. Although the FRA displacement involves safety concerns relating to movement over the rails, the policy statement is clear: OSHA does not apply to the physical structures described in the statement; displacement is not limited to the *activity* of moving equipment over the rails. (Emphasis in the original.)

Velasquez, 734 F.2d at 218. *Accord: Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577, 1580-81 (1982) (Holding that OSHA regulations would not apply to working conditions involving those railroad structures and facilities enumerated at 43 Fed.Reg. 10587 (pp. A53-54)).

Nor does plaintiff treat *Norfolk & W. Ry. v. Public Utilities Comm'n of Ohio*, 727 F.Supp. 367, *aff'd.*, 926 F.2d 567 (6th Cir. 1991) with any degree of candor. Plaintiff claims that *Norfolk & W. Ry.* "did not discuss working conditions on bridges." (Br. at 16). That is untrue.

At issue in *Norfolk & W. Ry.* was a state railroad commission order which sought to address safe working conditions on railroad bridges by requiring handrails and walkways to lessen the chance of falling. The federal court, however, reasoned that such regulations were preempted by the FRA's 1978 Policy Statement *precisely because* the Statement so clearly declared that railroad bridges should be within FRA's sole

jurisdiction. *Norfolk & W. Ry.* at 370. Moreover, the federal court concluded that Congress had only reinforced that preemption by confirming through 45 U.S.C. §431(n) (1988) that the FRA should have exclusive jurisdiction "*in the area of bridge safety equipment.*" *Norfolk & W. Ry.*, at 370-71 (Emphasis added).

Plaintiff also contends that the lower court was correct in reasoning that the FRA's exclusive exercise of authority over track and associated structures, including bridges, could reasonably be restricted to "geometric and other technical standards" related to bridges' dimensions and structural integrity. (Br. at 14) Not only is such a conclusion in direct conflict with *Norfolk & W. Ry.*, but it is contrary to specific FRA regulations pertaining to employee fall protection. As the federal court observed in *Norfolk & W. Ry.* at 370, the FRA assumed continuing jurisdiction over employee fall protection on railroad bridges as early as 1976. See, 41 Fed.Reg. 50302 (1976) (p. A60); 42 Fed.Reg. 22184 (1977) (p. A62); 43 Fed.Reg. at 10586 (1978) (p. A49); and 57 Fed.Reg. 28116 (1992).

Secretary of Labor v. Consolidated Rail Corp., OSHRC Docket No. 78-21119, *aff'd*, 9 OSHC 1892 (1981) is the only "federal authority" which even remotely supports the lower court. (Br. at 17). In that unpublished opinion, an OSHA administrative law judge was not persuaded that the 1978 Policy Statement served to oust OSHA from jurisdiction over railroad bridges (pp. RA6-10). He refused to consider the Policy Statement to be preemptive due to a failure of proof, particularly the absence of evidence from "any responsible official of FRA." (p. RA9).

Plaintiff's brief emphasizes that the OSHA Review Commission affirmed the administrative law judge, but obscures

the fact that the Review Commission soon reversed itself in *Secretary of Labor v. Consolidated Rail Corp.*, 10 OSHC 1577 (1982). Therein, the railroad defendant *did* offer proof of the FRA's preemptive intent through the letter affidavit of the then FRA Administrator, John M. Sullivan. *Consolidated Rail Corp.* at 1579, n. 8. The OSHA Review Commission's subsequent reversal of its earlier opinion was explicit and complete:

> ...(T)he FRA Policy Statement is an exercise of the FRA's statutory authority that gives rise to an exemption under Section 4(b)(1) of the OSH Act. Accordingly, we overrule Conrail I to the extent that it is inconsistent with our decision in this case.

Consolidated Rail Corp. at 1579.

Plaintiff's citation to *Southern Pacific Transp. Co. v. Public Utilities Comm'n of California*, 647 F.Supp. 1220, *aff'd. per curiam*, 820 F.2d 1111 (9th Cir. 1987) is also unavailing. (Br. at 9). That litigation addressed state regulatory authority over the railroad industry, not the FRA/OSHA dichotomy. The court simply found that the 1978 Policy Statement did not preclude states from regulating railroad safety under those limited circumstances specified in the Federal Railroad Safety Act, itself. *Southern Pacific Transp. Co.* at 1223.[5/]

Ultimately, plaintiff can only justify the lower court by contending that a federal agency's retrospective statement of intent necessarily trumps preexisting federal decisional law, as

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[5/] Plaintiff omits the only aspect of the case which is material. That litigation marked still another instance wherein the FRA submitted letter affidavits asserting its exclusive jurisdiction over the railroads' operating environment. *Southern Pacific Transp. Co.* at 1226-27.

well as contrary statutory and constitutional mandates. "After all", according to plaintiff, "it is only the agency's intent, not the court's, which controls the scope of preemption." (Br. at 16).

Such an unreasoned deference to federal agencies should not become a part of the fabric of federal law. Previously, agency interpretations have always been measured against a court's best reading of Congress' own overriding intent, the plain language of the regulation itself, and the greater constitutional framework of federal law. *Consumer Product Saf. Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-120 (1980). *Accord: Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988); *Udall v. Tallman*, 380 U.S. 1, 17-18 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

The retrospective agency interpretation here at issue comes thirteen years after the publication of the Policy Statement it purports to interpret and, by the agency's own admission, constitutes an interpretation which had previously eluded everyone in the regulated community, its own inspectors and the federal courts. 56 Fed.Reg. at 3435 (p. A70). Thus, this very case illustrates the arbitrary results which will occur if agency determinations are placed beyond judicial scrutiny.

As emphasized by the Amicus Brief filed by the Association of American Railroads, the potential effect of the lower court's analysis of federal law will not "be felt in this case alone." (Br. at 2). The FRA claimed exclusive jurisdiction over "railroad operations" in the 1978 Policy Statement. 43 Fed.Reg. 10586 (p. A47-48). If as the lower court concluded, the FRA failed to adequately define that phrase, then neither the nation's railroads nor federal and state regulators may now be reasonably certain of the sweep of the FRA's exclusive jurisdiction. (Amicus Br. at 9-

13). Plaintiff may now magnanimously concede the FRA's exclusive jurisdiction over railroad bridge safety (Br. at 2); but, if the lower court's opinion is correct, all else is confusion and subject to resolution only by *ad hoc* civil litigation. The end result will be a proliferation of overlapping, piecemeal attempts to apply federal and state OSHA regulations throughout the railroad industry - the very antithesis of stated Congressional policy. This Court should act now to prevent such a result.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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PETITIONER'S SUPPLEMENTAL APPENDIX

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

James P. Daley
Senior Vice President
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July 18, 1990

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RE: FRA Jurisdiction Over Working
Conditions On Railroad Bridges

Dear Mr. Linsey,

Through membership in the Association of American Railroads, I recently became aware that both the Secretary of Transportation, Samuel K. Skinner, and FRA Administrator, Gilbert E. Carmichael, have expressed reservations about promulgating rules or regulations concerning safe working conditions on railroad bridges. I was further advised that the Secretary and the FRA are considering the possibility of ceding FRA jurisdiction over the subject to OSHA.

We at the Chicago and North Western Transportation Company sincerely hope that the AAR has misinterpreted the situation and that no such proposal is under consideration. As you are aware, the Federal Railroad Safety Act (FRSA) calls for

nationally uniform safety regulations and uniform enforcement. The Act explicitly authorizes the Secretary of Transportation to prescribe appropriate regulations "for all areas of railroad safety." 45 U.S.C. §432 (1970). Furthermore, there is a specific federal statute on point -- 45 U.S.C. §431(n) -- which charges the Secretary of Transportation (not the Secretary of Labor) with the responsibility of issuing "such rules, regulations, orders and standards as may be necessary for the safety of maintenance of way employees...."

Moreover, railroad management and labor have previously joined together to submit proposed standards for safe working conditions which were intended to assist the FRA in responding to its Congressional mandate. Thus, CNW finds it difficult to credit the possibility that FRA is even considering ceding its jurisdiction to OSHA.

Nonetheless, given the remote possibility that the Secretary of Transportation may even be contemplating such a course of action, CNW is obliged to register a most emphatic protest. As the attached citations indicate, OSHA does not have jurisdiction over working conditions on railroad bridges. Likewise, ceding jurisdiction over the subject to OSHA would constitute very poor public policy which would fragment railroad regulation in derogation of the express intent of Congress.

It is the FRA, not OSHA, which has the authority and expertise necessary to effectively regulate the safety of working conditions on railroad bridges. As the following legal authorities establish, ceding such authority to OSHA would not only be without legal foundation, but it would be detrimental to the railroad industry. Such a development would shatter the Congressional policy mandating uniformity of railroad regulation and promote the Balkanization of railroad regulation in an important area of employee safety.

I.
The FRA Has Exclusive Jurisdiction Over Working Conditions On Railroad Bridges

In 1970 Congress enacted the Federal Railroad Safety Act (FRSA), 45 U.S.C. §421, et.seq. As the Seventh Circuit Court of Appeals has observed, "(T)he purpose of the Act was to provide comprehensive and uniform safety regulations in all areas of railroad operations." Chicago Transit Authority v. Flohr, 570 F.2d 1305, 1308 (7th Cir. 1977). This was clearly the Congressional intent because the Act explicitly authorized the Secretary of Transportation to adopt railroad regulations "to promote safety in all areas of railroad operations." 45 U.S.C. 421 (emphasis added). Furthermore, the FRSA explicitly stated that "the Secretary of Transportation [or his agents]...shall (1) prescribe as necessary appropriate rules, regulations, orders and standards for all areas of railroad safety...." 45 U.S.C. §432 (emphasis added).

In 45 U.S.C. §434, Congress further declared its intention that laws, rules, regulations, orders and standards relating to railroad safety should be uniform and consistent. Indeed, the legislative history of the FRSA evidences a clear Congressional intent that rail safety regulations be nationally uniform:

> "With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulations and enforcement. It is a national system..."

H.R.Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4109-4111.

Given this clear Congressional mandate, the preemptive effect of the FRSA had been broadly construed by the federal courts. For example, in commenting on the FRSA, the Third Circuit Court of Appeals said, "We believe these statutory provisions evince, as the district court determined, a 'total

preemptive intent.'" National Ass'n of Regulatory Utility Com'rs. v. Coleman, 542 F.2d 11, 13 (3rd Cir. 1976). Similarly, the Fifth Circuit has noted, "The meaning of the Congressional declaration is clear. The ultimate goal of the Act is to establish national uniform control of railroad safety...." Donelon v. New Orleans Terminal Co., 474 F.2d 1108, 1112 (5th Cir. 1973).

The federal courts have not been unmindful that the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §§651-678, also addresses occupational safety, but they have recognized that the OSH Act addresses working conditions in a broader industrial environment, and that the OSH Act is inapplicable whenever the FRA has primary jurisdiction over the railroad working conditions at issue. Velasquez v. Southern Pacific Transp. Co., 734 F.2d 216 (5th Cir. 1984); Southern Pacific Transp. Co. v. Usery, 539 F.2d 386, 391 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); Southern Ry. v. Occupational Saf. & H. Rev. Comm., 539 F.2d 335, 339 (4th Cir. 1976). Also see, Atchison T. & S. F. Ry. v. Illinois Commerce Comm'n, 453 F.Supp. 920 (N.D. Ill. 1977) applying the same logic to preempt state safety legislation affecting the railroad industry.

Indeed, deference to the FRA's primary jurisdiction over occupational health and safety issues pertaining to the railroad industry is reflected in Section 4(b)(1) of the OSH Act itself, which cedes jurisdiction over employee "working conditions" to other federal agencies which have more specific Congressional authority to enforce standards or regulate working conditions affecting specific occupations:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies...exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health. (Emphasis added.)
>
> 29 U.S.C. §653(b)(1)

Correspondingly, the FRA has consistently declared its exclusive jurisdiction over working conditions pertaining to railroad bridges based upon its special expertise and knowledge concerning the railroad industry. For example, in November, 1976, the FRA addressed the issue of whether walkways should be required as an employee safety measure on all railroad bridges. 41 Fed.Reg. 50 (1976). This FRA rulemaking was terminated in April, 1977 when the FRA concluded that such a mandate could not be justified because it would impose significant added financial burdens on the railroad industry. The FRA determined that diverting railroad resources from other maintenance and improvement projects would not serve the overall interests of employee safety. 42 Fed.Reg. 22185 (1977).

A year later the FRA reiterated its exclusive jurisdiction over railroad bridges by again publishing similar conclusions regarding bridge walkways:

> FRA has affirmatively determined that issuance of Federal regulations governing walkways on bridges is not warranted based on the projected cost of installation and the collateral safety problems which would be created.
>
> 43 Fed.Reg. 10586 (1978)

Additionally, on March 14, 1978, the FRA issued a sweeping policy statement describing the amount of authority it was willing to cede to OSHA. The FRA policy statement included the following declarations which are pertinent to the present controversy:

> "Within the area of railroad operations, it is FRA which must decide what regulations are necessary and feasible ...FRA has now exercised its statutory authority...While it is expected that additional regulatory initiative may be undertaken as necessary,...it is the judgment of the agency that piecemeal regulation of individual hazards... by any other agency of government would be disruptive and contrary to the public interest. Should it be

> demonstrated that further specific regulatory actions is required...FRA will not hesitate to employ its emergency powers or to initiate special-purpose proceedings directed to the solution of individual problems. Therefore, as the primary regulatory agency, FRA has exercised and continues to exercise its jurisdiction over the safety of railroad operations." (Emphasis added.)
>
> 43 Fed.Reg. 10586 (1978)

Specifically, the FRA went on to declare that OSHA regulations would be allowed to have some application to railroad offices and shops that had the character of a general or industrial setting, but no more. The FRA retained exclusive jurisdiction over the railroads' field operations and all matters pertaining to "(1) track, roadbed and associated devices and structures, (2) equipment and (3) human factors." Vol. 43, Fed.Reg. 10585. In regard to those areas, the FRA declared that "(I)n these traditional areas of railroad safety, FRA has developed a special expertise which makes this agency uniquely qualified to play the primary role in the Federal Government's role to assure safe employment...in activities related to railroad operations." Vol. 43, Fed.Reg. 10585.

The FRA declared its exclusive jurisdiction over the railroads' field operations, and specifically declared that "OSHA regulations...would not apply to...railroad bridges":

> "OSHA regulations concerning working surfaces deal with such matters as ladders, stairways, platforms, scaffolds and floor openings. Generally, these regulations are applicable in railroad offices, shops, and other fixed work places. There are three principal exceptions to the rule. First, they would not apply with respect to the design of locomotives and other rolling equipment used on a railroad, since working conditions related to such surfaces are regulated by FRA as major aspects of railroad operations.

> Second, as the agency which has exercised jurisdiction over railroad operations, FRA is responsible for the safe movement of rolling stock through railroad repair shops. OSHA requirements for general industry are in some respects inconsistent with the optimum safety of employees in this unique environment where hazards from moving equipment predominate. Therefore, OSHA regulations on guarding of open pits, ditches, etc., would not apply to inspection pits in locomotive or car repair facilities. FRA is better equipped to assess proper clearance technology and employee knowledge of existing industry practices as well as the prevalence and severity of hazards represented by specific injury occurrence codes in accident/incident reporting statistics. FRA is responsible for determining what additional regulatory steps, if any, may be necessary in this area in light of overall safety considerations.
>
> Third, the OSHA regulations would not apply to ladders, platforms, and other surfaces on signal masts, cantenary systems, railroad bridges, turntables, and similar structures or to walkways beside the tracks in yards or along the right-of-way. These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety." (Emphasis added.)
>
> 43 Fed.Reg. 10587 (1978)

Thus, the FRA declared "OSHA regulations" inapplicable to those areas within FRA's special expertise, including railroad bridges. In fact, even OSHA's own Review Commission, which is charged with the final administrative adjudication of the OSHA Act, under 29 U.S.C. §659, has recognized that "there is no doubt that the FRA has the statutory authority to regulate the safety of employees in the railroad industry." Secretary of Labor v. Consolidated Rail Corp., 10 OSHC 1577, 1579-81 (1982). Moreover, in the same proceeding the OSHA Review

Commission conceded that FRA's declarations of jurisdiction in March of 1978 ousted OSHA from jurisdiction over all aspects of the railroad industry other than limited jurisdiction over railroad shops and offices that typified a more traditional industrial setting. Secretary of Labor v. Consolidated Rail Corp., 10 OSHC at 1579-81.

Finally, the federal courts have likewise held that OSHA jurisdiction over working conditions on railroad bridges has specifically been preempted by the FRA's declaration of March, 1978. Velasquez v. Southern Pacific Co., 734 F.2d 216 (5th Cir. 1984); Norfolk & W. Ry. v. Public Utilities Comm'n of Ohio, 727 F.Supp. 367 (S.D. Ohio 1990).

Very recently, in Norfolk & W. Ry., supra, the Federal District Court reiterated that the FRA declaration of 1978 clearly displaced OSHA regulations and rendered them inapplicable to railroad bridges:

> "Finally, in 1978, the FRA issued a statement indicating which aspects of the railroad industry fall under its exclusive jurisdiction thereby displacing applicable OSHA regulations: 'OSHA regulations would not apply to...railroad bridges....These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety.'" (Citing 43 Fed.Reg. 10587 (1978)) (Emphasis added.)

Norfolk & W. Ry., 727 F.Supp. at 370.

Apparently, FRA Administrator Carmichael has been advised by his staff that working conditions involving personal protective equipment could be severed from all other aspects of bridge construction and FRA jurisdiction over same thereby ceded to OSHA. The Norfolk & W. Ry. case also squarely disposes of such a contention.

The Norfolk & W. Ry. court noted that the 1988 amendment to the FRSA specifically reconfirmed FRA's exclusive jurisdiction over working conditions involving railroad bridges, including personal protective equipment. The statute clearly underscores Congress' conviction that the FRA is best qualified to determine what, if any, federal regulation might be required to further the interest of employee safety when working on railroad bridges. Norfolk & W. Ry., 727 F.Supp. at 370-71.

Indeed, the 1988 amendment to FRSA specifically states that "standards for bridge safety equipment" are for the sole discretion of the Secretary of Transportation and the Federal Railroad Administration:

> The Secretary shall within one year after June 22, 1988, issue such rules, regulations, orders and standards as may be necessary for the safety of maintenance of way employees, including standards for bridge safety equipment, such as nets, walkways, handrails, and safety lines, and requirements relating to instances when boats shall be used.
>
> 45 U.S.C. §431(n)

Thus, the 1988 amendment to the FRSA only further confirms that OSHA has no authority to regulate employee working conditions on railroad bridges and that it is solely the responsibility of the FRA to "issue such rules, regulations, orders and standards as may be necessary" for the safety of employees engaged in bridge work. Norfolk & W. Ry., 727 F.Supp. at 371.

Certainly the Federal Court of Appeals sitting in Velasquez v. Southern Pacific Co., 734 F.2d 216 (5th Cir. 1984), believed that it was compelled to reach such a conclusion. In that case, a jury returned an FELA verdict against a railroad as a result of an employee's fall from a bridge and a claimed violation of OSHA regulations. On appeal, however, the Fifth Circuit found, as a matter of federal law, that the OSHA regulations did not apply to working conditions on railroad bridges and walkways because the

FRA declaration of March, 1978, has clearly displaced OSHA from any jurisdiction:

> The FRSA has issued a statement indicating which aspects of the railroad industry fall under the exclusive jurisdiction of the FRA, thereby displacing applicable OSHA regulations. That statement provides:
>
> > "OSHA regulations would not apply to ladders, platforms,...railroad bridges, turntables, and similar structures or to walkways beside the tracks...These are areas which are so much a part of the operating environment that they must be regulated by the agency with primary responsibility for railroad safety."
>
> 43 Fed.Reg. 10583-10590 (1978) (emphasis added by the court).
>
> The accident in the present case occurred on a walkway beside a track in a yard, and on a railroad bridge. The FRA policy statement provides that such areas are not subject to OSHA regulations. It is not necessary that the FRA implement specific regulations for these areas; an assertion of authority in a policy statement is sufficient to displace OSHA regulations. [citations] (Emphasis added)

Velasquez, 734 F.2d at 218.

Therefore, when one considers FRA's preemptive declaration of March, 1978 and OSHA's deferential response thereto in Secretary of Labor v. Consolidated Rail Corp., 10 OSHC 1577 (1982), as well as the binding federal judicial precedent cited herein, it is not surprising that Congress declared in 45 U.S.C. 431(n) (1988) that FRA shall "issue such rules, regulations, orders and standards as may be necessary for the safety of maintenance-of-way employees...." In passing the FRSA,

Congress had clearly always intended that the Secretary of Transportation should exercise exclusive authority to prescribe rules and regulations for all areas of railroad safety and the mandate found in §431(n) is only further evidence of this consistent Congressional intent. Thus, as a matter of law, clearly FRA cannot avoid the specific mandate of 45 U.S.C. §431(n) by referencing OSHA regulations which are inapplicable to the railroad industry.

II.
As A Matter Of Sound Public Policy FRA Should Prescribe Those Rules and Regulations Applicable To Working Conditions On Railroad Bridges

Public Policy reasons for exclusive FRA jurisdiction are readily found in the applicable federal legislation, as well as in the public pronouncements of the FRA, itself. I have also discussed these matters with C&NW's Vice President - Engineering, R. H. McDonald, and we would offer the following reasons why the FRA should not cede jurisdiction to OSHA:

1. First, and foremost, the FRA should exercise the authority specifically delegated solely to it by 45 U.S.C. §431(n) because the law so provides. The Secretary of Transportation or his agents are charged by Section 431(n) with considering the necessity of bridge safety equipment and with issuing appropriate rules and regulations. Deferring to pre-published OSHA regulations which apply to American industry as a whole would not comply with the specific Congressional mandate. FRA has not held hearings on OSHA's industrial regulations involving safely belts and nets (1926.103, 1926.104, 1926.105 and 1926.106) to determine if they would be suitable for application to working conditions on railroad bridges nor has FRA provided railroad management or labor with an opportunity to comment on same. Thus, a blanket deferral to OSHA would not be consistent with the Congressional mandate. Indeed, should FRA choose to ignore its clear Congressional mandate on the grounds of

expediency it will only delay final resolution of these important matters by formenting future litigation. Such uncertainty could hardly be said to be consistent with the best interests of employee safety.

Furthermore, 45 U.S.C. §431(n) specifically charges FRA with the obligation to reconsider its earlier pronouncements on bridge walkways. Deferring to OSHA regulations 1926.103-1926.106 would not satisfy this specific Congressional mandate, because railroad bridge walkways are not discussed there and FRA has previously declared walkways to be within its sole jurisdiction. See, 42 Fed.Reg. 22185 (1977); 43 Fed.Reg. 10586 (1978).

2. FRA deference to OSHA's general industrial regulations is the exact opposite of what Congress clearly intended in passing FRSA and in empowering the Secretary of Transportation to prescribe safety rules "for all areas of railroad safety." 45 U.S.C. §432. Congress clearly intended that OSHA should defer to FRA's expertise and not the opposite. Likewise, Congress clearly intended that the ultimate goal of the Act is to establish rational, uniform, control over railroad safety. That goal will not be realized so long as railroad field operations are regulated by both OSHA and FRA. Thus, for the FRA to actually promote such a result would truly be a dramatic step backward.

3. Any ill-conceived "deference" to OSHA on the subject of bridge working conditions would not only expand the application of OSHA's inappropriate industrial regulations to the railroad industry, but it would also create the opportunity for further fragmentation of railroad regulation, precisely the result Congress was attempting to avoid in passing the FRSA.

FRA's declarations of jurisdiction are exclusive and preemptive and have the effect of ousting both OSHA and state legislation from application. Norfolk & W. Ry. v. Public Utilities Comm'n. of Ohio, 727 F.Supp. 367 (S.D. Ohio 1990);

Atchison, T. & S.F. Ry. v. Illinois Commerce Comm'n., 453 Supp. 920 (N.D. Ill. 1977).

However, such is not the case with OSHA regulations for the enabling legislation pertaining to OSHA specifically states that OSHA's regulations shall not supersede state laws. See, 29 U.S.C. §653(4). Indeed, it has repeatedly been held that OSHA's regulations do not preempt state laws pertaining to workplace hazards, including construction work. Manufacturers Ass'n. of Tri County v. Knepper, 801 F.2d 130 (3rd Cir. 1986), cert. denied, 108 S.Ct. 66, 484 U.S. 815 (1986); West Virginia Mfrs. Ass'n. v. State of W.Va., 714 F.2d 308 (C.A.W.Va. 1983); Berardi v. Getty Refining & Mktg. Co., 435 N.Y.S.2d 212, 107 Misc. 2d 541 (1980).

Thus, by ceding jurisdication over bridge working conditions to OSHA, the FRA will actually be also inviting state regulation over the same working conditions because OSHA jurisdiction is not exclusive. Such a development would not only prove unduly burdensome to the railroad industry, but it would also be directly contrary to the clear Congressional intent in passing FRSA, which was to establish a "uniform body of regulations and enforcement." H.R. Rep. No. 1194, 91st Cong., 2d Sess., reprinted in the U.S. Code Cong. & Admin. News 4104, 4111 (1970).

4. It would not be in the best interests of employee safety to adopt OSHA's protective equipment regulations as they are written because Section 1926.105 has been declared to be unconstitutionally vague and uncertain by both the Fifth and Eighth Circuit Courts of Appeal in Brennan v. Occupational Safety & Health Rev. Comm'n., 488 F.2d 337, 338-39 (5th Cir. 1973) and in Brennan v. Occupational Safety & Health Rev. Comm'n., 513 F.2d 713, 716 (8th Cir. 1975).

Perpetuating such poor draftsmanship would not serve anyone's interests and might subject the Secretary of Transportation and FRA to justifiable criticism.

5. At a time when the application and scope of the FELA, itself, is under reconsideration it would be terribly inappropriate to render it even more harsh and punitive by absorbing OSHA's ambiguous industrial regulations pertaining to working at heights within the scope of the FELA through FRA decree.

In Pratico v. Portland Terminal Co., 783 F.2d 255 (1st Cir. 1985) the Court of Appeals held that in those instances where OSHA regulations do apply to the railroad industry, their effect as a safety regulation is to strip the railroad of the defense of contributory negligence under the Federal Employer's Liability Act and to render railroads absolutely liable to an injured employee for on the job accidents.

As the dissenting judge wrote in Practico:

> "This court strips the railroad of a customary defense in mitigation of damages -- contributory negligence -- by construing against it an ambiguous regulation over which the Secretary of Labor, who has not spoken, has primary jurisdiction. I do not think that Congress, when it enacted 45 U.S.C. §53 intended to remove the consequences of a plaintiff's own contributory negligence in such slippery circumstances."
>
> Practico at p. 270.

Certainly the FRA, who has the specific authority to regulate the railroad industry, should not act to place the railroad industry further out on such a "slippery" slope by broadening OSHA's jurisdiction over the railroad industry.

6. As observed in Practico, OSHA's jurisdiction is intended to cover all American industry that is not otherwise regulated and the language found in its regulations is therefore broad and ambiguous. Such inexact regulation will not serve the best interests of railroad management or labor and should be avoided.

If OSHA is to regulate personal protective equipment, the opportunity for misunderstandings and delays between regulator and regulated greatly increase. With much of American industry to regulate, will OSHA effectively find time to consider or be willing to allow necessary clarifications or amendments for the railroad industry? Presumably the railroad industry would not be allowed a clarification if, in so doing, an ambiguity in the regulation would then be created for the petrochemical industry or the steel industry. Such delays, misunderstandings and misinterpretations should not be risked, particularly in the important area of employee safety. FRA clearly understands the workings of the railroad industry and has the authority to act.

7. Finally, it seems clear that public policy dictates that the railroad industry not be subjected to dual regulation if it may be avoided for only inefficiency and ambiguity can result.

For example, if both FRA and OSHA are to have jurisdiction over bridge working conditions, the federal government will have to pay for dual inspections during track work involving bridges and the railroads will have to be responsive to same. Dual record keeping for the same track project would also result. And who will resolve the "grey areas" of overlapping jurisdiction, while the industry suffers from needless ambiguity? Again, the attendant risks of delay, misunderstanding and misinterpretation should be considered. Particularly here where issues of employee safety are at stake and the FRA clearly understands the workings of the industry and has the authority to act.

I trust this response has not been too lengthy, but C&NW's Engineering and Law Departments are greatly troubled by the mere suggestion that the FRA may be considering conceding its jurisdiction to OSHA in this important area. We certainly did not want the depth of C&NW's concern to be misunderstood or unappreciated. We thank you for the opportunity to address you on this matter. I trust that you will share C&NW's thoughts and

opposition to the OSHA proposal with the appropriate personnel within the FRA and the Department of Transportation.

Sincerely yours,

James P. Daley
Senior Vice President Law,
General Counsel and Secretary

cc: R. H. McDonald
Vice President - Engineering

W. H. Dempsey
President, AAR